IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2009-406-100

	IN THE MATTER OF	of the Land Transfer Act 1952
	BETWEEN	GILL CONSTRUCTION COMPANY LIMITED Applicant
	AND	GLEN KENNETH MORGAN AND SHARLEENE EMMA MORGAN Respondents

Hearing: 29 April 2009

Appearances: D Clark for the applicant
No appearance for the respondents

Judgment: 1 May 2009

JUDGMENT OF CLIFFORD J

Introduction

[1] On 23 May 2009 Gill Construction Co Ltd, the applicant, obtained a charging order absolute (the Charging Order) in relation to land (the Property) owned by its judgment debtors Ivan and Suzanne Weaver. On 17 July 2008 the applicant obtained a writ of sale in relation to the Property. The Property has subsequently been sold and settlement is set for 8 May 2009.

[2] On 4 March 2009 Glen and Sharleene Morgan, the respondents, registered a caveat (registration 8045886.1 – the Caveat) against the Property. The applicant understands that the respondent Sharleene Morgan is the daughter of the Weavers. The Caveat, by its terms, purports to secure an acknowledgement of debt dated 4 March 2009.

[3] The applicant applies to this Court for the removal of the Caveat.

Background

[4] The Charging Order was obtained by the applicant on the basis of a judgment of 19 March 2007 against the Weavers for payment of the sum of $1,834,636.58. That judgment was sealed on 12 April 2007.

[5] The Charging Order was registered against the certificate of title of the Property (3 Sandy Bay, Keneperu Sound, Marlborough Sounds) on 25 June 2008.

[6] On 17 July 2008 the applicant obtained a writ of sale in relation to the Property and the Property was seized by the bailiff on 13 August 2008. The original judgment obtained is still unsatisfied. The Property was sold at auction on 17 April 2009 and, as noted, the settlement date for the sale is 8 May 2009.

[7] On 18 December 2008 the respondents first registered a caveat (registration 8032578.1 – the Earlier Caveat) in relation to the Property. The Earlier Caveat was said to be in relation to an acknowledgement of debt dated 10 December 2008. That acknowledgement referred to an agreement that the respondents lend $25,000 to the Weavers on 11 July 2008, to be secured by registration of a caveat.

[8] On 14 January 2009, after being requested to withdraw the Earlier Caveat, the respondents registered a withdrawal.

[9] As noted, the Caveat (at issue here) was registered on 4 March 2009. It refers to an acknowledgement of debt also dated 4 March 2009. The applicant is unclear whether the Caveat relates to the alleged sum secured by the Earlier Caveat.

[10] The applicant's solicitors have requested the solicitor who lodged the Caveat on behalf of the respondents to remove the same. The Caveat has not yet been removed.

[11] The applicant has filed an affidavit of service, confirming that these proceedings were served on the respondents on 21 April. The respondents have taken no steps in these proceedings. They did not appear and were not represented at the hearing of this application before me.

Basis of application

[12] The applicant makes this application in reliance on s 143 of the Land Transfer Act 1952 and on the basis of the principles of law establishing the priorities of charging orders referred to in *Property Restoration Ltd v Farquhar* [1991] 3 NZLR 498.

[13] The applicant submits that the interest of the respondents represented by the Caveat ranks subsequent to the applicant's interests as represented by the Charging Order and, now, the sale pursuant to that Charging Order.

Discussion

[14] In my view, there is little doubt that, as a matter of priority, the Charging Order ranks prior to the interest – however it may be categorised – represented by either of the Caveat or the Earlier Caveat.

[15] In terms of priorities of charging orders, the Court in *Firth Concrete Industries Ltd v Duncan* [1973] 1 NZLR 188 at 190-191 noted as follows:

> It has long since been laid down that a charging order against land is subject to all the liens and equities created over the land prior to the date of the registration of the charging order.

[16] In *Property Restoration Ltd v Farquhar*, Anderson J stated at 502-503:

> Although a charging order is, on the authorities, subject to equities existing at the time of registration, the fact of registration is notice to the world that the debtor's interest in the subject land is affected for the benefit of the charge holder. This conclusion must be reinforced by the mandatory provision for registration of the charge against Land Transfer Act land by virtue of R 574.

[17] When the Charging Order was registered on 25 June 2008, the judgment debtors (the Weavers) were the registered proprietors and, from the certificate of title, it appears that the only lien on the Property at that time was a mortgage to the National Bank.

[18] The Earlier Caveat, registered subsequently on 18 December 2008, refers to an agreement to lend of 11 July 2008 "on the basis that the debt would be secured by a registration of the Caveat" against the Property. Therefore, even if the Caveat relates to that alleged debt, the interest represented by the Charging Order, registered on 25 June 2008, ranks prior to that represented by the Caveat.

[19] In any event, the Earlier Caveat was removed on 14 January 2009, and the Caveat was registered on 4 March 2009, referring to an acknowledgement of debt dated that day. That acknowledgement does not refer to an earlier debt or security. There can therefore be no question but that the interest represented by the applicant's Charging Order ranks prior to any interest represented by the Caveat.

[20] In my view, therefore, the applicant has, in principle, made out its case for the removal of the Caveat.

[21] At this point, however, one apparent difficulty arises.

[22] Applications to remove a caveat are made under s 143 of the Land Transfer Act. To apply to remove a caveat under that section a person must be:

a) an applicant to bring land under the Land Transfer Act;

b) the registered proprietor; or

c) any other person having any registered estate or interest in the estate or interest protected by the Caveat.

[23] To apply under s 143 to remove this caveat, the applicant must therefore qualify as "any other person having any registered estate or interest in the estate or interest protected by the Caveat".

[24] The term "estate or interest" is defined in the Land Transfer Act to mean "every estate in land, also any mortgage or charge on land under this Act". The interest represented by the Caveat not being an estate in land, or a mortgage on land, it is necessary that it qualify as a charge on land for the applicant to be in a position to apply under s 143.

[25] There is authority in New Zealand that a charging order does not form a "charge" on the debtor's estate, and therefore does not render its holder a secured creditor in bankruptcy.

[26] In *Blaikie v Malcolmson* (1886) NZLR 4 SC 408 at 409, the Court held:

> In this case I have come to the conclusion that the claim of the Official Assignee must prevail. A charging order under our Code [of Civil Procedure], does not, in my opinion, form a "charge" on the debtor's estate within the meaning of s 61, subsection (4) [Bankruptcy Act 1883]. It is merely a stop order preventing the disposition of a property until the creditor has an opportunity of making his judgment effectual by seizure and sale.

[27] Were this authority to apply in this context, it would appear that the applicant would not have standing under s 143 to apply for the removal of the Caveat. The question of whether an applicant could, in reliance on a registered charging order absolute, apply under s 143 was left open by Master Gambrill in *Re Bartica Investments Ltd* HC AK M553/97 28 May 1997.

[28] To conclude, following *Blaikie v Malcolmson*, that the applicant does not have standing under s 143 is not, as a matter of first principle, an appealing conclusion. In my view, it would frustrate the High Court Rules that provide for judgment creditors to enforce judgments by way of Charging Orders against land, and subsequent seizure and sale, were the applicant not to be in a position here to apply to remove the Caveat.

[29] I raised this apparent difficulty with Mr Clark, counsel for the applicant, at the hearing. Mr Clark was not able immediately to resolve that difficulty. I gave Mr Clark leave to file further submissions. The further submissions Mr Clark filed yesterday have been of considerable assistance to me in finalising this judgment.

[30] The decision in *Blaikie v Malcolmson*, and subsequent consideration in New Zealand of the same question which has followed that authority, would appear to have been influenced – as regards the status of charging orders – by a consideration of the relationship between the rights of a creditor who has obtained a charging order against the estate of a debtor, and the rights of the Official Assignee on the bankruptcy of that debtor. By reference to the provisions of the Insolvency Act 2006, the early equivalents of which were considered in *Blaikie v Malcolmson*, I note as follows:

a) In bankruptcy, s 109 of the Insolvency Act 2006 entitles the Assignee to require the sheriff, who has taken property of a debtor in execution and is served with notice of the debtor's adjudication before the execution is completed, to deliver to the Assignee any goods and money seized.

b) Pursuant to s 110, the sheriff must retain the proceeds of execution (not limited to execution as regards goods; goods, as defined in the Insolvency Act, being limited to tangible personal property) for ten working days and, if served with notice of the debtor's adjudication within that period, pay the balance of those proceeds (after the deduction of the costs of execution) to the Assignee, who is entitled to retain them as against the execution creditor.

[31] Sections 251 and 252 of the Companies Act 1993 are to equivalent effect in the case of the liquidation of a company although notice, under the equivalent of s 109, has to be given before completion of execution which, in the case of land (see s 251(4)(c)), is completed by sale.

[32] It can be seen, therefore, that the authority in *Blaikie v Malcolmson* very much concerns the relationship between a judgment creditor, the Assignee or liquidator, and unsecured creditors generally. It was in that context that Gillies J in *Blaikie v Malcolmson* held that a charging order did not form a "charge" on the debtor's estate so as to prevail over the Official Assignee.

[33] As Tipping J recognised in an unreported decision referred to me by Mr Clark, *Re Estate of Piercy ex p Baynes* HC INV M52/87 11 March 1988, those considerations do not in my view necessarily result in the conclusion that a charging order is not a charge.

[34] In *Piercy's* case, Tipping J analysed the concept of charge as it applies to charging orders in the context of an application by an unsecured creditor that an allegedly insolvent estate be administered under Part XVII of the then Insolvency Act 1967. The creditor sought the order to overcome the effect of charging orders obtained against assets comprising part of that estate by a finance company. The creditor argued that, as the charging orders did not create a charge and did not provide any form of security in favour of the creditor, then if an order for administration was obtained the charging orders would no longer prevail, and no payments could subsequently be made to the finance company creditor out of the estate, other than on a pro rata basis. The creditor relied on *Blaikie v Malcolmson*, and subsequent authority applying *Blaikie v Malcolmson*, in support of that proposition.

[35] After a comprehensive analysis of the authorities, Tipping J concluded that it was not correct to say that a charging order did not create a charge. He held, particularly by reference to r 548 of the then High Court Rules (now r 17.40), that a judgment creditor who had taken out a charging order could be said to be holding a charge on the property of a debtor. In doing so, he noted that r 548 had no equivalent provision under the former Code of Civil Procedure. At the same time, and as regards the merits of the application, he recognised that the equivalent provisions of the then Insolvency Act 1967 to those referred to at [29] meant that a charging order, as a form of execution, did not prevail unless execution had been completed before adjudication or receipt of any relevant notice by the creditor. He noted, therefore, that although he was not prepared to hold that a charging order did not create a charge, so as to mean that the finance company creditor who had obtained the charging order was not a secured creditor, nevertheless that creditor's interest was vulnerable to the Assignee. There was, therefore, a reason to make the order sought by the unsecured creditor.

[36] Tipping J's decision in *Piercy's* case has been followed, in the insolvency context, in *Re Coll* HC AK B17382/92 2 December 1992 and in *Re Gate* (1996) 9 PRNZ 568.

[37] This application does not arise in the context of an insolvency. Nevertheless, like Tipping J I do not think that the matters considered by Gillies J in *Blaikie v Malcolmson,* and the fact that a creditor who has the benefit of a charging order is vulnerable in the insolvency or winding up of the judgment debtor, lead to the conclusion that a charging order now does not create a charge.

[38] As Tipping J noted, the wording of the High Court Rules is clear. They provide, now in rule 17.40(1):

> A charging order charges the estate, right, title, or interest of the liable party in the property described in the order with payment of the amount for which the entitled party may obtain or has obtained judgment.

[39] The term "charge" is not defined under the Land Transfer Act.

[40] *Fisher and Lightwood's Law of Mortgage* (11ed 2002) defines a "charge" at paras 1.5 and 2.1 as:

> The appropriation of real or personal property for the discharge of a debt or other obligation, without giving the creditor either a general or special property in, or possession of, the subject of the security; for example, an order upon a third party to apply money in his hands to the discharge of a debt or a charge on realty for the payment of a specified amount. The creditor has a right of realisation by judicial process in case of non-payment of the debt.
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> …
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> A charge is a security whereby real or personal property is appropriated for the discharge of a debt or other obligation, but which does not pass either an absolute or a special property in the subject of the security to the creditor, nor any right to possession. In the event of non-payment of the debt, the creditor's right of realisation is by judicial process. (footnotes excluded)

[41] A charging order charges the estate or interest of the judgment debtor with payment of the amount of the judgment sum. It does not give the holder property in, or possession of, the estate or interest, but entitles the holder to apply for a sale order to complete execution. On this basis, therefore, it seems clear to me that a charging

order comprises a charge on the land, and, as such, comprises an "interest" in the land in terms of the definition in s 2 of the Land Transfer Act.

[42] Here, the applicant has registered its charging order. In my view, it thereby has a registered interest in the land.

[43] Accordingly, I find that the applicant does have standing under s 143 to apply, and grant its application. There will be an order accordingly.

[44] Costs will follow the event on a 2B basis.

"Clifford J"

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